

**Appl. No.** : 09/840,548  
**Filed** : April 23, 2001

### **REMARKS**

The January 10, 2007 Office Action was based on pending Claims 1-9, 11, 13-16, and 21-28. This amendment amends Claims 1, 13, and 25-28. Thus, after entry of this amendment, Claims 1-9, 11, 13-16, and 21-28 are pending and presented for further consideration.

The January 10, 2007 Office Action rejects Claims 1-9, 11, 13-16, and 21-28 under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 5,668,857 to McHale ("the McHale Patent"). Further, the Office Action rejected Claims 1-9, 11, and 25-28 under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.

#### **REJECTION OF CLAIMS 1-9, 11 AND 25-28 UNDER 35 U.S.C. 101**

The Office Action rejected claims 1-9, 11, and 25-28 under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.

##### **Claim 1**

Claim 1 has been amended to recite "determining with a processor availability of the outgoing dial-up modems at the second server".

##### **Claims 2-9, and 11**

Claims 2-9 and 11, which depend from Claim 1, are believed to be patentable for the same reasons articulated above with respect to Claim 1, and because of the additional features recited therein.

##### **Claim 25**

Claim 25 has been amended to recite "A computer readable medium storing computer readable instructions that when executed by a computer performs a method of communicating a message via a computer network, the computer readable medium comprising computer readable instructions...", as requested by the Examiner.

##### **Claims 26-28**

Claims 26-28 have been correspondingly amended to recite "the computer readable medium comprising computer readable instructions". Claims 26-28, which depend from Claim 25, are believed to be patentable for the same reasons articulated above with respect to Claim 25, and because of the additional features recited therein.

**Appl. No.** : 09/840,548  
**Filed** : April 23, 2001

Applicant respectfully requests the Examiner to withdraw the rejection of Claims 1-9, 11, and 25-28 under 35 U.S.C. § 101.

**REJECTION OF CLAIMS 1-9, 11, 13-16 and 21-28 under 35 U.S.C. 102(b)**

The Office Action rejects Claims 1-9, 11, 13-16 and 21-28 under 35 U.S.C. 102(b) as being anticipated by McHale.

**Claim 1**

McHale does not teach sending the message via an available outgoing dial-up modem and the public switched telephone network. Instead, McHale discloses providing data communication from a network, such as the Internet, to a computer via an available modem. McHale's system also provides telephone service to the computer, but the modems do not receive or transmit data over a public switched telephone network. See Figures 1 and 2. In contrast, an embodiment of the invention sends a message via an available outgoing dial-up modem and the public switched telephone network.

Because the reference cited by the Examiner does not disclose, teach or suggest sending a message via an available outgoing dial-up modem and the public switched telephone network, in combination with the other recitations of independent Claim 1, Applicant asserts that Claim 1 is not obvious in view of McHale. Applicant therefore respectfully submits that Claim 1 is patentably distinguished over the cited reference and Applicant respectfully requests allowance of Claim 1.

**Claims 2-9, and 11**

Claims 2-9, and 11, which depend from Claim 1, are believed to be patentable for the same reasons articulated above with respect to Claim 1, and because of the additional features recited therein.

**Claim 13**

Although Claim 13 has different language than Claim 1, Claim 13 is believed to be patentable for similar reasons (where applicable), and because of the different features recited therein.

**Claims 14-16**

Claims 14-16, which depend from Claim 13, are believed to be patentable for the same reasons articulated above with respect to Claim 13, and because of the additional features recited therein.

**Claim 21**

Although Claim 21 has different language than Claim 1, Claim 21 is believed to be patentable for similar reasons (where applicable), and because of the different features recited therein.

**Claims 22-24**

Claims 22-24, which depend from Claim 21, are believed to be patentable for the same reasons articulated above with respect to Claim 21, and because of the additional features recited therein.

**Claim 25**

Although Claim 25 has different language than Claim 1, Claim 25 is believed to be patentable for similar reasons (where applicable), and because of the different features recited therein.

**Claims 26-28**

Claims 26-28, which depend from Claim 25, are believed to be patentable for the same reasons articulated above with respect to Claim 25, and because of the additional features recited therein.

**CONCLUSION**

Although amendments and cancellations have been made, no acquiescence or estoppel is or should be implied thereby. Rather, the amendments and cancellations are made only to expedite prosecution of the present application, and without prejudice to presentation or assertion, in the future, of claims on the subject matter affected thereby. Furthermore, any arguments in support of patentability and based on a portion of a claim should not be taken as founding patentability solely on the portion in question; rather, it is the combination of features or acts recited in a claim which distinguishes it over the prior art.

In view of the foregoing, the present application is believed to be in condition for allowance, and such allowance is respectfully requested. If further issues remain to be

**Appl. No.** : 09/840,548  
**Filed** : April 23, 2001

resolved, the Examiner is cordially invited to contact the undersigned such that any remaining issues may be promptly resolved.

Also, please charge any additional fees, including any fees for additional extension of time, or credit overpayment to Deposit Account No. 11-1410.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: April 6, 2007

By: Karen J. Lenker  
Karen J. Lenker  
Registration No. 54,618  
Agent of Record  
Customer No. 20,995  
(949) 760-0404

3610634/vz/040307